Supreme Court, U.S.
FILED

No. 09-629 NOV 25 2009

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

BRANDON THREET,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals**

## PETITION FOR WRIT OF CERTIORARI

RICHARD E. WETZEL
LAW OFFICE OF
RICHARD E. WETZEL
1411 West Avenue
Suite 100
Austin, TX 78701
(512) 469-7943
(512) 474-5594 (fax)

*Attorney for Petitioner Brandon Threet*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DENIAL OF POST-CONVICTION HABEAS CORPUS RELIEF BY THE STATE COURT CONFLICTS WITH THE STANDARD THIS COURT HAS ESTABLISHED FOR THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

2. WHETHER THE PROCEDURE EMPLOYED BY THE STATE COURT IN DECIDING PETITIONER'S POST-CONVICTION HABEAS CORPUS APPLICATION COMPLIED WITH DUE PROCESS OF LAW.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT OF THE CASE | 2 |
| A. SUMMARY OF THE ISSUES | 2 |
| B. STATEMENT OF FACTS | 3 |
| C. PROCEDURAL HISTORY | 6 |
| REASONS FOR GRANTING THE PETITION | 7 |
| CONCLUSION | 29 |

APPENDIX

| | |
|---|---|
| A. Denial of relief by the Texas Court of Criminal Appeals | App. 1 |
| B. Findings of fact and conclusions of law by the trial court | App. 2 |

# TABLE OF AUTHORITIES

Page

CASES

*Blackledge v. Allison*, 431 U.S. 63 (1977) .....27

*Briggs, Ex parte*, 187 S.W.3d 458 (Tex.Crim.App. 2005) .....16

*Brown, Ex parte,* 662 S.W.2d 3 (Tex. Crim. App. 1983) .....23

*Case v. Nebraska*, 381 U.S. 336 (1965) .....22

*Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157 (1917).....23

*Evitts v. Lucey*, 469 U.S. 387 (1984).....22

*Ford v. Georgia*, 498 U.S. 411 (1991).....*23*

*Ford v. Wainwright*, 477 U.S. 399 (1986) .....23

*Kyles v. Whitley*, 498 U.S. 931 (1990) .....22

*Kyles v. Whitley*, 514 U.S. 419 (1995) .....8

*Long v. Dist. Ct. of Iowa*, 385 U.S. 192 (1966).....22

*McKane v. Durston*, 153 U.S. 684 (1894).....22

*McKnight v. State*, 661 S.E.2d 354 (S.C. 2008) .....16

*McMann v. Richardson*, 397 U.S. 759 (1970).....7

*Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005) .....16

*Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).....22

*People v. Montgomery*, 763 N.E.2d 369 (Ill. App. 2001) .....16

TABLE OF AUTHORITIES – Continued

Page

*Powell v. Alabama*, 287 U.S. 45 (1932).....7

*Rompilla v. Beard*, 545 U.S. 374 (2005) .....15

*Strickland v. Washington*, 466 U.S. 668 (1984) ...7, 8, 14

*Threet, Ex parte*, WR-72,165-01 (Tex. Crim. App. 2009) .....7

*Threet v. State*, 2003 WL 21087837 (Tex. App. – Austin 2003, no pet.).....6

*Ward v. Commissions of Love County*, 253 U.S. 17 (1920).....23

*Wiggins v. Smith*, 539 U.S. 510 (2003).....14, 16, 25

*Williams v. Taylor*, 529 U.S. 362 (2000).....8

CONSTITUTION

U.S. CONST. amend. V.....1, 21

U.S. CONST. amend. VI .....1, 7

U.S. CONST. amend. XIV.....2, 7

STATUTES

TEX. CODE CRIM. PROC. art. 11.07.....23

TEX. PEN. CODE § 6.04(a) .....11

28 U.S.C. § 1257 .....1

TABLE OF AUTHORITIES – Continued

Page

RULES

TEX. R. EVID. 201 .....25

TEX. R. EVID. 404(a)(1).....19

TEX. R. EVID. 608(b) .....19

## PETITION FOR A WRIT OF CERTIORARI

Brandon Threet respectfully petitions for a writ of certiorari to review the denial of state post-conviction habeas corpus relief by the Texas Court of Criminal Appeals.

## OPINION BELOW

The denial of relief by the Court of Criminal Appeals is not published. App. 1.

## JURISDICTION

The Court of Criminal Appeals denied habeas corpus relief on September 2, 2009. App. 1. This petition is being filed within 90 days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal

prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

### A. SUMMARY OF THE ISSUES

Petitioner seeks a writ of certiorari on two issues related to his claim of ineffective trial counsel. Petitioner was charged with the offense of murder. Trial counsel failed to undertake an adequate investigation before conceding petitioner was responsible for the death of the decedent. By focusing on the degree of culpability associated with the death and virtually ignoring the issue of causation, counsel essentially conceded petitioner's guilt of some species of homicide. Failing to properly consider and apply the standard this Court has established for effective counsel, the state courts excused counsel's failure to discover petitioner's actions were not the cause of the decedent's death.

Petitioner additionally complains of the manner in which the state courts disposed of his habeas corpus application. The state courts repeatedly ignored

requests for evidentiary hearings, depositions, and the appointment of disinterested experts, before deciding the application. Through techniques such as judging credibility on the basis of an affidavit and the improper use of judicial notice, the state courts denied petitioner due process of law in the consideration and disposition of his state habeas application.

## B. STATEMENT OF FACTS

Petitioner encountered Terence McArdle at a late-night beer-drinking and sports-watching party on October 6, 2001, at the home of Eric Stahl in the Anderson Mill area of Williamson County, Texas. Stahl's parents were out of town. Petitioner and McArdle, both college students, did not know each other before the night of the party. Petitioner was nineteen and McArdle had turned eighteen that day. The testimony at trial revealed that both had consumed alcohol that evening.

At one point during the evening, petitioner became annoyed with McArdle because McArdle was wearing a pair of ski goggles "just to be funny." After McArdle, a student of tae kwon do, did a back flip in the living room, bumping a piece of furniture with photographs on it, Stahl told him to be careful. Petitioner confronted McArdle, telling him that he did not need to be doing flips, that he would break something. The encounter between petitioner and McArdle became heated as the two men exchanged profanities. A witness recalled that petitioner grabbed

the goggles from McArdle's face and pushed him to the ground. Stahl separated them and another friend took petitioner out to the backyard of the house where a number of party-goers had gathered.

Within twenty to forty minutes, another confrontation occurred when petitioner and McArdle encountered each other in the backyard. They again exchanged words over the goggles and, after McArdle at first declined to fight, they decided to settle the dispute over possession of the goggles by "trading licks," with McArdle taking the first punch.

The "fight" was captured on videotape by one of the party's attendees. The videotape was given to the police on the following day. The videotape was played for the jury at trial.

McArdle took the first punch, striking petitioner in the chest with his fist. Using his full body mass, petitioner then struck McArdle in the face, knocking him to the ground. Acknowledging at trial that he was "just out of control," petitioner struck McArdle two or three more times as he lay on the ground. As a bystander attempted to pull petitioner away from McArdle, petitioner swung at the bystander. Taking three steps, petitioner, who was wearing hiking boots, then approached McArdle at an angle, kicking McArdle in the head.

Lying unconscious on the ground, McArdle was carried into the house and placed in a chair and then a couch. He was bleeding from his mouth and his breathing was labored. Petitioner departed the

premises shortly thereafter. McArdle was eventually taken to the Seton Northwest Hospital emergency room and later transferred to Brackenridge Hospital. Dr. John Bedolla testified that, when McArdle arrived at Seton, he had no vital signs, neurological activity, or cardiac activity. Bedolla associated McArdle's discoloration with prolonged cardiac arrest. At Brackenridge, Dr. Daniel Peterson, a neurosurgeon, determined that McArdle was brain dead. McArdle remained on a ventilator until five days later when he was taken off life support. A Travis County, Texas, medical examiner, Dr. Vladimir Parungao, performed an autopsy on McArdle's body. Parungao determined that the cause of death was petitioner striking McArdle in the face and kicking him in the head.

Petitioner testified that after McArdle hit him in the chest and knocked the wind out of him, he lost his temper, and overreacted. He did not intend to hurt or kill McArdle and was not aware of the risk that kicking someone could cause death.

Petitioner was indicted for the offense of murder in relation to McArdle's death. The trial court instructed the jury on the offenses of murder, manslaughter, and negligent homicide. The prosecutor asked the jury to convict petitioner of murder. Defense counsel argued that, although petitioner caused McArdle's death, he did not commit murder, was not aware of the risk that kicking someone could cause death, and that the jury should decide what offense he committed. Counsel inferred that the jury should convict petitioner of negligent homicide

without saying so directly. A jury found petitioner guilty of the lesser-included offense of manslaughter, and he was sentenced to twenty years in prison and a fine in the amount of $10,000.

## C. PROCEDURAL HISTORY

Petitioner pled not guilty to the indicted offense of murder in cause number 01-1096-K368 in the 368th District Court of Williamson County, Texas, before the Honorable Burt Carnes. A jury convicted him of manslaughter and assessed his punishment at 20 years in prison and a $10,000 fine on July 22, 2002.

Notice of appeal was timely filed. The Third Court of Appeals of Texas affirmed petitioner's conviction in an unpublished opinion issued on May 15, 2003. *Threet v. State*, 2003 WL 21087837 (Tex. App. – Austin 2003, no pet.). No discretionary review was sought by petitioner in the Texas Court of Criminal Appeals.

On November 14, 2008, petitioner filed a state post-conviction application for writ of habeas corpus with the convicting court in Williamson County, Texas. The application challenged trial counsel's effectiveness at trial. The convicting court rejected petitioner's request for a live evidentiary hearing, depositions, or the appointment of a disinterested expert on the claims presented. On May 28, 2009, the convicting court entered findings of fact and conclusions of law recommending the denial of the relief

sought by the petitioner. App. 2-22. On September 2, 2009, the Texas Court of Criminal Appeals denied the relief sought without written order in *Ex parte Threet*, WR-72,165-01 (Tex. Crim. App. 2009). App. 1.

## REASONS FOR GRANTING THE PETITION

### 1. WHETHER THE DENIAL OF POST-CONVICTION HABEAS CORPUS RELIEF BY THE STATE COURT CONFLICTS WITH THE STANDARD THIS COURT HAS ESTABLISHED FOR THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; *Powell v. Alabama*, 287 U.S. 45, 59 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient; that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense; that counsel's errors were so serious as to

deprive the defendant of a fair trial with a reliable result.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Ultimately, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The *Strickland* standard applies to the determination of ineffective assistance of counsel as it impacts the result of the proceeding. *Williams v. Taylor*, 529 U.S. 362, 390 (2000).

Petitioner need not show a reasonable probability that, but for counsel's errors, he would have been acquitted or received a lesser sentence. Rather, the issue is whether he received a fair trial that produced a verdict and a sentence worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The State filed a motion in limine to prohibit the defense from suggesting that McArdle's death was in any way related to an aneurysm, malformation of the brain or arteries or anything other than the defendant's misconduct. The prosecutor told the court at a pre-trial hearing on the day before jury selection

that, despite speculation in the emergency room that an aneurysm was the cause of death, other tests had eliminated this possibility, and that the medical evidence will "conclusively without any reasonable doubt show that the death was not the result of an aneurysm." Lead defense counsel responded that the defense "had not considered aneurysm" and did not intend to present any medical testimony. The trial court granted the motion and prohibited the defense from mentioning "aneurysm" as the cause of McArdle's death.

Dr. Daniel Peterson, the neurosurgeon who treated McArdle at Brackenridge Hospital, testified that "the whole of his brain was coated with blood [and was] similar to what we see when a patient ruptures an aneurysm," but that his condition was not caused by an aneurysm. Dr. Peterson elaborated that two-to-four percent of the population has an aneurysm, and there is a two-to-four percent chance in any given year that it will spontaneously bleed. An angiogram did not show "any evidence of any vascular abnormality such as an aneurysm or an arterial venous malformation," and he was able to eliminate "with complete medical confidence the possibility of an aneurysm causing that bleeding." In his opinion, the bleeding was caused by petitioner's conduct depicted in the videotape of the incident. Defense counsel did not cross-examine Dr. Peterson on the nature of McArdle's injuries or cause of death.

Dr. Vladimir Parungao, the Travis County Medical Examiner, conducted the autopsy on McArdle and

testified that the cause of death was blunt trauma to the head. He "explored" the brain, including the veins, to make sure that there was no evidence of an aneurysm.

Defense counsel conceded during summation that petitioner caused McArdle's death and argued that petitioner was guilty of an offense less than murder. The jury convicted of manslaughter.

Dr. Richard Hirshberg, a neurosurgeon, reviewed the videotape, hospital records, autopsy report and photographs, police reports, and the trial testimony of Drs. Peterson and Parungao and provided a detailed affidavit in the state habeas proceeding setting forth his opinion regarding the cause of death. He concluded, within a reasonable degree of medical certainty, "that the cause of the decedent's death was a subarachnoid hemorrhage before the altercation from an unknown source, probably a cerebral aneurysm or arterio venous malformation or a bleed related to cerebral hypertension as reflected by his hyperactive conduct." His opinion is based on the following information contained in the records before the state habeas court:

- doctors suspected an aneurysm or vascular malformation hemorrhage following the CAT scan at Brackenridge Hospital;
- there was no evidence of a brain injury on the CAT scan or at autopsy;

- cerebral anoxia (complete deprivation of oxygen to the brain) along with subarachnoid hemorrhage (bleeding into the subarachnoid space surrounding the brain) were the major findings on the CAT scan and at autopsy; and
- the type of bleeding observed would be most unusual due to trauma, except in the more significantly injured brain, but there was no evidence of injury to the decedent's brain.

Dr. Hirshberg acknowledged being informed that section 6.04(a) of the Texas Penal Code provides that "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." TEX. PEN. CODE § 6.04(a). He concluded that "the altercation seen in the video and described by witnesses did not directly or indirectly cause or contribute to cause the death of [the decedent]." Finally, he addressed the trial testimony of Drs. Peterson and Parungao:

> The trial testimony of Dr. Daniel Peterson, a neurosurgeon, does not change my opinions. He testified that the cause of death was blunt-force trauma to the head causing a "fatal brain injury." However, he failed to identify evidence of any brain injury, including an injury to the brain stem leading to cardio-respiratory cessation either on the

CT scan or at autopsy. He failed to explain why he suspected an aneurysm or arterio-venous malformation and ordered a complete angiogram on a dying patient; and whether he had ever seen this distribution of blood due to trauma without any evidence of cerebral contusion, abrasion, or traumatic diffuse axonal injury. He testified that there were no therapeutic options; he failed to mention that doctors suggested ventricular drainage, but the decedent's parents refused. He testified that the decedent's brain was coated with blood "similar to what we see when a patient ruptures an aneurysm," but that the chances of an aneurysm spontaneously bleeding are "quite rare." I agree that what he observed was typical of an aneurysm bleed. However, absent evidence of any injury, including bruises or contusions, the logical conclusion is that the decedent was bleeding from an aneurysm or other source before he was kicked in the face. Contrary to his testimony, aneurysms, arterio-venous malformations, and hypertensive bleeds – all possible here – are not rare. He testified that he was able to eliminate "with complete medical confidence" the possibility of an aneurysm causing the bleeding. Further testing was required to eliminate this possibility, including arteriograms and a complete inspection of the brain's blood vessels; this was not done. Finally, he failed to acknowledge that progressive, unrelieved hydrocephalus, unlike what is found in acute brain injuries, leads to apnea (respiratory cessation).

> The trial testimony of Dr. Vladimir Parungao, the pathologist, also does not change my opinions. It does not appear that he recognized the significance of his findings regarding the lungs, which reflect that the doctor-caused air in the chest cavities led to lung compression and the probability of aspiration, as noted upon the decedent's arrival in the emergency room. He testified that he observed bruises on the skull; he probably meant on the face. He testified that the kick in the head caused the bleeding; he did not identify any evidence of brain injury as a cause of this bleeding at autopsy, and this is a clinical conclusion that cannot be made in the absence of direct evidence at autopsy. He was aware of only one instance, 20 years ago, where a blow to the face caused brain bleeding that resulted in death. He testified that there was no evidence at autopsy of any malformation; he inspected only the Circle of Willis vessels at the base of the brain, and there are numerous other sites for aneurysms and other malformations. Finally, he failed to explain in his testimony (and in our telephone conversation) how the kick to the face caused death in this case.

Defense trial counsel provided an affidavit in the state habeas proceeding. He and co-counsel discussed with Dr. David Folkers "the possibility of some pre-existing condition of the deceased." In trial counsel's judgment, the defense "could never show that there was a pre-existing condition" that contributed to McArdle's death and that "any attempt to show that

the boy died of some cause other than the kick would not be well received by the jurors."

Dr. David Folkers, a general surgeon who graduated from medical school in 1990, provided an affidavit in the state post-conviction habeas corpus proceeding. He reviewed the videotape, hospital records, and autopsy report at the request of co-counsel, his friend. He told defense counsel before trial, on June 30, 2002, that the autopsy report was not detailed enough to enable him to determine whether the pathologist did a thorough search for an aneurysm. He said that he would contact Dr. Peterson to obtain additional information. Thereafter, Dr. Folkers called Dr. Peterson, said that he was consulting with defense counsel, and asked to discuss the case; but Dr. Peterson refused to do so. Folkers' affidavit reflects he told defense trial counsel that he had no basis to conclude that the head trauma did not cause the death, but that he is not a neurologist or neurosurgeon and suggested that they consult with one.

This Court has established counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. at 690-91. Thus, the threshold question is whether trial counsel's decision not to consult with a neurosurgeon regarding the cause of death was reasonable. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Investigative decisions are not to be viewed through hindsight, but rather by counsel's perspective at the time the

decisions are made. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

The record before the state habeas court reflects defense trial counsel sought an informal opinion regarding the cause of death from Dr. Folkers, a general surgeon. Dr. Folkers did not have sufficient information or expertise to render a knowledgeable opinion and suggested that trial counsel consult with a neurologist or a neurosurgeon. Instead, trial counsel unilaterally decided, without consulting with a specialist, "that we could never show that there was a pre-existing condition that had contributed to the death" and that "any attempt to show that the boy died of some other cause other than the kick would not be well received by the jurors." Within his affidavit before the state habeas court, trial counsel admitted, in essence, that he made a strategic decision not to challenge the cause of death without consulting with a specialist. This Court has previously addressed the constitutional inadequacy of such a decision:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

> investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

*Wiggins v. Smith*, 539 U.S. at 521-22.

Trial counsel's failure to consult with a neurosurgeon and present expert testimony challenging the cause of death constituted deficient performance. *See McKnight v. State*, 661 S.E.2d 354, 360-61 (S.C. 2008) (counsel ineffective in failing to investigate cause of death); *cf. Ex parte Briggs*, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) (counsel ineffective in advising defendant to plead guilty without seeking expert opinion regarding cause of death); *People v. Montgomery*, 763 N.E.2d 369, 374-75 (Ill. App. 2001) (ineffective assistance claim remanded for hearing where counsel failed to investigate and present expert testimony challenging cause of death). Here, trial counsel's decision not to challenge the cause of death was unreasonable because he did not consult with a qualified expert. A strategic decision made after an inadequate investigation does not constitute an informed professional judgment. *Wiggins v. Smith*, 539 U.S. at 521-22.

Assuming *arguendo* that trial counsel made a reasonable strategic decision not to challenge the cause of death at the guilt-innocence stage, it was unreasonable not to present expert testimony in mitigation of punishment. *Cf. Miller v. Dretke*, 420

F.3d 356, 365-66 (5th Cir. 2005) (finding counsel ineffective in failing to present expert testimony regarding defendant's medical and psychological problems in mitigation of punishment). Had counsel presented expert testimony at the punishment stage, he could have persuasively argued that petitioner's punishment should be substantially less because McArdle's pre-existing medical condition contributed to his death. The jury probably would have assessed less than 20 years had it realized that petitioner's conduct was not the sole cause of McArdle's death.

The defense filed a motion in limine that the State not mention that petitioner had been in fights or had a bad temper. The prosecutor agreed at the pretrial motion hearing to abide by the motion in limine. Thereafter, the prosecutor violated the motion in limine by eliciting the following testimony without objection at the guilt-innocence stage:

- that petitioner's temper led him to yell at his girlfriend;
- that petitioner hit a door when he was 13 years old;
- that petitioner made racial slurs;
- that petitioner got a new "show-off" truck with big wheels after he was indicted;
- that a Department of Public Safety trooper stopped petitioner in the truck and questioned him about an odor of marijuana; and

- that petitioner continued to go to parties where alcohol was served while the murder charge was pending.

Trial counsel spent much of his summation attempting to diffuse the testimony regarding petitioner's bad acts and character traits, which he suggested was offered because the murder case was weak and the prosecutor wanted the jury to dislike petitioner. The prosecutor argued that the jury could not believe petitioner's testimony regarding the incident because he lied about using racial slurs and that driving around the neighborhood in a new truck demonstrated his lack of remorse. The prosecutor asked the jury at the punishment stage to assess the maximum sentence, observing that petitioner's life had not changed since the offense, as he got a brand-new truck and continued to go to parties.

Trial counsel refused to explain in his state habeas corpus affidavit why he did not object to the prosecutor violating the motion in limine and offering evidence of petitioner's bad acts and character traits. He simply asserted, "The Defendant took the witness stand and gave his account concerning each of those instances, none of which I considered to be serious. The Defendant handled them very well. I felt it was important for Brandon to come across as candid about his life since we knew we'd be facing this evidence at punishment for some homicide."

Evidence of the defendant's character or a trait of his character is not admissible for the purpose of

proving that he acted in conformity therewith on a particular occasion, except "evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same." TEX. R. EVID. 404(a)(1). The State cannot introduce evidence of the defendant's bad character unless he has placed his character in issue. For example, where the defendant does not introduce testimony that he has a normal temper, the State cannot introduce testimony that he has a bad temper. Furthermore, where the defendant denies on cross-examination that he engaged in a specific instance of misconduct – such as, making racial slurs – the State cannot impeach him with extrinsic evidence on a collateral matter. TEX. R. EVID. 608(b). Petitioner submits that trial counsel's failure to object to testimony that petitioner was hot-tempered, racially biased, remorseless, and may have possessed marijuana after the charged offense constituted deficient performance.

The defense trial strategy of persuading the jury to convict petitioner of a lesser included offense was successful, as the jury convicted him of manslaughter instead of murder. However, the decision to adopt this strategy without consulting with a neurosurgeon was unsound. Had the jury heard expert testimony that the kick in the head did not cause McArdle's death, there is a reasonable probability that the outcome of the proceeding would have been different.

The jury probably would have acquitted petitioner had it heard expert testimony that McArdle died because of a pre-existing subarachnoid hemorrhage

instead of the kick to the head. Such testimony would have raised "considerable doubt as to the reliability of the original medical examiner's conclusion that [the decedent's] death was the result of homicide."

Had the jury concluded, despite the expert testimony, that the kick in the head caused McArdle's death, yet it believed or had a reasonable doubt that petitioner was truthful in testifying that he was not aware of the risk that a kick could cause death, it would have convicted him of negligent homicide instead of manslaughter. Trial counsel inferred during summation that the jury should convict petitioner of negligent homicide because he was not aware of and did not consciously disregard the risk that his conduct would cause death. The prosecutor responded that the jury could not believe petitioner's testimony regarding the incident because he lied about using racial slurs, and that driving around the neighborhood in a new truck and continuing to go to parties demonstrated his lack of remorse. Thus, the prosecutor emphasized this inadmissible testimony in arguing that petitioner was not credible. The jury probably would have convicted petitioner of negligent homicide or assessed less than 20 years for manslaughter had it not heard the testimony and argument that he was hot-tempered, racially biased, and remorseless. The sentence probably would have been even less had the jury heard expert testimony that McArdle's pre-existing medical condition, at the very least, contributed to his death.

But for counsel's errors, there is a reasonable probability that the jury would have acquitted petitioner, convicted him of negligent homicide, or assessed less than 20 years for manslaughter. Had the court overruled timely objections to the inadmissible testimony regarding petitioner's bad acts and character traits, there is a reasonable probability that an appellate court would have reversed a conviction. A manslaughter conviction and 20-year sentence obtained under these circumstances are not worthy of confidence.

Accordingly, petitioner submits the denial of post-conviction habeas corpus relief by the Texas Court of Criminal Appeals conflicts with the standard this Court has established for the effective assistance of counsel at trial. Petitioner should be granted a new trial in which he is afforded his right to the effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments.

## 2. WHETHER THE PROCEDURE EMPLOYED BY THE STATE COURT IN DECIDING PETITIONER'S POST-CONVICTION HABEAS CORPUS APPLICATION COMPLIED WITH DUE PROCESS OF LAW.

Although the Court has held that the Due Process Clause of the Fifth Amendment does not establish any right to a direct appeal, the Court has not held that a state defendant possesses no constitutional right to some type of state court collateral review of

federal constitutional challenges to his conviction or sentence. *See McKane v. Durston*, 153 U.S. 684, 687-88 (1894); *Case v. Nebraska*, 381 U.S. 336 (1965) (per curiam) (granting certiorari to decide "whether the Fourteenth Amendment requires the states to afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees," but refusing to address the issue because the state legislature provided for such review after certiorari was granted); *see also Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of a stay of execution) (noting that "the scope of a state's obligation to provide collateral review is shrouded in so much uncertainty.").

If a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution, and in particular, in accord with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1984). Thus, if a state provides a habeas corpus or other collateral remedy, then the state courts must afford defendants procedures that comport with basic due process. *See Long v. Dist. Ct. of Iowa*, 385 U.S. 192 (1966) (per curiam) (state prisoner has constitutional right to free court reporter's transcription of state habeas corpus evidentiary hearing for purpose of appeal in state court system); *cf. Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-90 (1998) (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., concurring in judgment) (basic due process

protections apply in post-conviction clemency process); *id.* at 291-92 (Stevens, J., dissenting); *Ford v. Wainwright*, 477 U.S. 399, 418-27 (1986) (Powell, J., concurring in judgment) (basic due process protections apply in post-conviction process to determine competency of death row inmate to be executed).

At a minimum, a state post-conviction remedy should include the right to an evidentiary hearing or to some other meaningful method of adjudicating dispositive factual allegations. State procedural rules or devices that are designed or serve to frustrate the adequate litigation of federal constitutional claims are not favored. *E.g., Ford v. Georgia*, 498 U.S. 411, 423 (1991) (refusing to recognize default of state procedural rule with which defendant could not reasonably have been expected to comply); *Ward v. Commissions of Love County*, 253 U.S. 17, 22 (1920) ("It therefore is within our province to inquire . . . whether the [federal] right was denied [by the state court] in substance and effect, as by putting forward nonfederal [procedural] grounds of decision that were without any fair or substantial support"); and *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157, 164 (1917) (adjudication of federal claim may not be frustrated by "mere device to prevent a review of the decision upon the federal question").

Utilizing his only available statutory remedy, petitioner sought to challenge his conviction in state court by filing an application for writ of habeas corpus under TEX. CODE CRIM. PROC. art. 11.07. The statute is the exclusive post-conviction remedy in

Texas in which to challenge a final non-capital felony conviction. *Ex parte Brown*, 662 S.W.2d 3, 4 (Tex. Crim. App. 1983).

The state application alleged petitioner was denied the effective assistance of counsel, primarily because counsel failed to consult with a neurosurgeon regarding the cause of death and present expert testimony that petitioner's conduct did not cause the death for which he was being prosecuted. Petitioner sought a hearing in the state convicting court. The state filed a general denial. Affidavits were filed by both parties. Proposed findings of fact and conclusions of law were filed by the parties. Ultimately, the trial court signed the state's proposed findings of fact and conclusions of law verbatim on May 28, 2009. App. 2-22.

The trial court found, based on information that trial counsel received from "a consulting doctor" and their "own personal investigation and judgment," that there was little likelihood of success challenging the cause of death. App. 5. The court concluded that their performance was not deficient because they relied, *inter alia*, on the advice of "an independent consulting medical doctor" in deciding not to challenge the cause of death. App. 18. The state habeas court finding omits that the defense "consulting doctor," David Folkers, is a general surgeon rather than a neurosurgeon and that Folkers suggested that trial counsel consult with a neurologist or a neurosurgeon. The affidavits by trial counsel ignore this critical fact as well. The resulting conclusion by the state habeas court is

flawed for the same reason. Counsel had a duty to consult with a medical expert who was qualified to give an opinion on the cause of death. Counsels' decision not to challenge the cause of death was unreasonable because they did not consult with a neurosurgeon. A strategic decision made after an inadequate investigation does not constitute an informed professional judgment. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Petitioner would have questioned trial counsel concerning his deficient performance had he been afforded the hearing he requested.

The state habeas court found that, based on its "experiences as a judge and lawyer in Williamson County," sentences imposed by local judges and juries for murder and other acts of violence that result in death typically exceed 40 years in prison. App. 5-7. Petitioner filed written objections to the improper judicial notice upon which relief was partially denied. There is no evidence of the matters judicially noticed in the record and such matters are not a subject of judicial notice. TEX. R. EVID. 201. Further, the matter judicially noticed is irrelevant because petitioner was convicted of manslaughter, which has a statutory maximum punishment of 20 years, not murder. Had petitioner been afforded the evidentiary hearing he requested, he would have objected when the state court sought to base its decision on improperly noticed facts.

The trial court found that petitioner needed over six years to find an expert to "say the victim died as a

result of some cause other than applicant's misconduct" and that it is "extremely unlikely that applicant's trial attorneys could have identified a credible neurosurgeon to testify at trial." App. 7-8.

If petitioner had been afforded the evidentiary hearing he requested on the state habeas application, he would have shown the falsity of the finding concerning the delay in hiring Dr. Hirshberg. Petitioner's conviction became final on appeal in June of 2003. Petitioner's previous habeas counsel hired Dr. Richard Hirshberg by the spring of 2004. The subsequent change in habeas counsel and delay in filing the application were due to financial considerations. Thus, this finding is inaccurate and not based on any credible evidence. Furthermore, had trial counsel contacted Dr. Hirshberg in 2002, he would have testified to the same opinions contained in his affidavits in the habeas corpus proceeding.

The trial court found and concluded that Dr. Hirshberg's first affidavit was not credible or reliable. App. 8, 19-20. However, Dr. Hirshberg is a board-certified neurosurgeon with impeccable credentials. He is much more qualified to render opinions about brain trauma – or the lack thereof – than a pathologist. Because the state challenged Dr. Hirshberg's credibility, and petitioner questioned the reliability of the pathologist's opinions, petitioner requested an evidentiary hearing or depositions; alternatively, he requested that the court appoint a board-certified neurosurgeon (who has no business or personal relationship with the parties or counsel) as an

independent expert to review all of the evidence relevant to the issue of cause of death and provide an affidavit. The state habeas court ignored these requests and proceeded to decide the case on the basis of untested affidavits.

Petitioner submits that deciding the issue on the basis of untested affidavits submitted by the state failed to provide him the forum he was due in which to litigate his claimed federal constitutional violation. This Court has recognized that when the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, and substantive objections to a petitioner's claims will normally raise factual issues that must be resolved at an evidentiary hearing. *Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977).

Thereafter, petitioner obtained a supplemental affidavit from Dr. Hirshberg addressing every complaint about him contained in the affidavit of Dr. David Dolinak, a pathologist, and the State's proposed findings. Dr. Dolinak did not file a supplemental affidavit in response. Nonetheless, the trial court signed the state's proposed findings and conclusions without incorporating Dr. Hirshberg's responses and analyzing whether they are credible and reliable.

Finally, the trial court concluded that, had trial counsel presented expert testimony to challenge the cause of death, it "could have resulted in a verdict of guilty as to murder, leaving applicant to face a far higher punishment range." App. 20. It is irrational to

conclude that the jury would have disbelieved petitioner's testimony that he did not intend to kill or cause serious bodily injury to the deceased and would have convicted him of murder simply because counsel called a neurosurgeon to testify that petitioner's conduct did not cause the death. There is simply no relationship between the credibility of petitioner's testimony and the medical question whether his conduct caused the death. Therefore, this conclusion is unreasonable.

The state courts ignored requests for evidentiary hearings, depositions, and the appointment of disinterested experts, before deciding the application. Through techniques such as judging credibility on the basis of an affidavit and the improper use of judicial notice, the state courts denied petitioner due process of law in the consideration and disposition of his state habeas application. Having established a mechanism for state collateral review of alleged federal constitutional violations, the state had an obligation to afford petitioner due process of law in the adjudication of his claim. The state failed in its obligation. Petitioner simply seeks an opportunity to litigate his Sixth and Fourteenth Amendment claim in a forum in which he will be afforded due process in the presentation, consideration, and disposition of his assertion of unlawful restraint.

## CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, reverse the denial of habeas corpus relief by the Texas Court of Criminal Appeals, and remand to the Texas Court of Criminal Appeals.

Respectfully submitted,

RICHARD E. WETZEL
LAW OFFICE OF
RICHARD E. WETZEL
1411 West Avenue
Suite 100
Austin, TX 78701
(512) 469-7943
(512) 474-5594 (fax)

*Attorney for Petitioner*
*Brandon Threet*

**Texas Court of Criminal Appeals**

**APPLICANT** **BRANDON THREET** **APPLICATION NO. WR-72,165-01**

**APPLICATION FOR 11.07**
**WRIT OF HABEAS CORPUS**

ACTION TAKEN

**DENIED WITHOUT WRITTEN ORDER.**

/s/ Tom Price — 9-2-09

**JUDGE** **DATE**

No. 01-1096-K368A

| | |
|---|---|
| EX PARTE | IN THE 368TH JUDICIAL |
| BRANDON THREET<br>Applicant | DISTRICT COURT OF<br>WILLIAMSON COUNTY,<br>TEXAS |

## State's Proposed Order

(Filed May 28, 2009)

Pursuant to Art. 11.07, § 2(c), TEX. CODE CRIM. PRO., the trial court makes the following findings of facts and conclusions of law.

## Findings of Fact

1. Applicant alleges that he was denied his Sixth Amendment right to effective assistance of counsel. In particular, applicant alleges his trial attorney (1) failed to consult with a neurosurgeon regarding the cause of death and to use expert testimony on that issue at trial and (2) failed to object to various bits of testimony regarding alleged bad acts and character traits.

2. Applicant was indicted for the first-degree felony of murder and faced a punishment range of 5-99 years or life in prison. The indictment also contained an allegation that applicant used or exhibited a deadly weapon (hand or foot). (CR.1-10).

3. Applicant retained attorney Roy Minton to represent him. Sam Bassett, who works in the

same law firm as Minton, also served as co-counsel, participating in pretrial and trial matters.

4. Roy Minton is an experienced criminal attorney who has been licensed to practice law in Texas since 1961. He has substantial experience in criminal jury trials and has handled complex criminal cases that have involved expert witnesses, including experts in the causes of death or injury to individuals. He has accumulated substantial experience and knowledge about how a jury might perceive a defense in a given case and has repeatedly exercised informed and cautious judgment in developing and presenting a defense.

5. Sam Bassett is an experienced criminal attorney who has been licensed to practice law in Texas since 1988. He has substantial experience in the trial of criminal cases and, in particular, in the preparation of cases for trial. He has handled discovery in numerous criminal cases and has a clear understanding of a defense attorney's duty to provide effective assistance in matters of discovery and investigation of a case.

6. The affidavits of Roy Minton and Sam Bassett are credible.

7. The original investigation by the Williamson Count Sheriff's Office in the instant crime led to the discovery of a videotaped recording of the incident. A videotape recording, admitted into evidence as State's Exhibit No. 7 (RR.VII-270) and played before the jury numerous times through several witnesses, showed in graphic detail that applicant struck the victim repeatedly

in the face and body with his fists, knocking him to the ground and rendering him temporarily defenseless. The videotape further shows that, while the victim was on the ground, applicant kicked the victim in the side of the head with a booted foot. The victim was knocked unconscious, and applicant failed to provide any medical assistance, leaving the scene of the crime to hide at his home. Other persons at the scene delayed taking applicant to a hospital. Eventually, when applicant was taken to a hospital, he was declared brain dead and, after a week on life-support, removed from life-support systems and declared dead. The recording was the most powerful piece of evidence and provided the jury with a complete and convincing explanation of the event. Any defense attorney would have faced a very difficult if not impossible task, even with expert testimony, of convincing the jury that the cause of death was anything but the blows inflicted by applicant on the victim. A portion of a still photograph from that video, depicts the moment that Brandon Threet kicked the victim in the head, causing the most serious injury:

[Picture Omitted In Printing]

8. Before trial, the State and applicant's attorneys reached an agreement to simplify the discovery and notice process, making sure that applicant got discovery of everything without a court order. (RR.II-2-4) In return, applicant waived his right to formal notice on extraneous offenses and punishment evidence and received full informal notice (RR.II-3). The State provided complete discovery of the State's case to applicant's

attorneys. That discovery included substantial information about the cause of death and any information that might be used to prove an extraneous offense or as punishment evidence.

9. Based on the trial court's observations before and during the trial, applicant's attorneys and the State communicated over the upcoming witnesses and evidence, often resolving disputes without any need for a formal ruling by the court. The lawyers, while acting diligently and zealously, all performed exceptionally and showed each other professional courtesies.

10. Given all of the evidence available to them through discovery, along with information they received from a consulting doctor and their own personal investigation and judgment, applicant's attorneys concluded that there was little if any likelihood of convincing a jury that the cause of death was an aneurysm or substantially anything other than the conduct of the applicant. Applicant's lawyers consciously focused their strategy on the applicant's mental state at the time of the crime, hoping to reduce the punishment range applicant would face if convicted.

11. Based on the trial court's experiences as a judge and lawyer in Williamson County, a conviction for murder almost certainly would have resulted in a substantial prison sentence. Typically, even with a guilty plea and a recommendation from the State, a murder conviction results in a sentence of 40-50 years in prison. A jury would typically impose a punishment even longer than

such an agreed punishment. Given the graphic evidence of applicant's actions a jury could very well have done the same in this case.

12. Applicant pleaded not guilty before a jury and presented a defense that focused on convincing the jury that applicant was guilty of some crime less serious than murder. That approach proved successful and was eventually reflected in the written jury charge, as the judge instructed the jury to consider the lesser-included options of manslaughter and criminally negligent homicide. (CR.1-113-26).

13. At trial, Dr. John Bedolla, a medical doctor licensed to practice medicine in Texas testified he treated the victim at the emergency room of Seton Northwest Hospital before he was transported to Brackenridge Hospital. (RR.V-276-77). He concluded that the injury to the victim was caused by the deadly blows shown on the videotape of the attack. (RR.V-280-81.)

14. At trial, Dr. Daniel Peterson, a neurosurgeon (focusing on surgical diseases of the brain and spine), testified he treated the victim at Brackenridge Hospital in Austin. (RR.V-283-84). He testified that the victim's brain injury was not caused by an aneurysm (an abnormality causing a weak spot in an artery). He eliminated the explanation of an aneurysm through the use of an angiogram. He concluded that the victim's brain injury and death were caused by the blunt-forced trauma inflicted by applicant to the victim's head. (RR.V-288-89, 293).

15. At trial, Dr. Valdimir Parungao, a medical examiner at the Travis County, ME's Office, testified he conducted an autopsy on the victim. (RR.V-22-27). He eliminated the explanation of an aneurysm by a visual examination of the brain. (RR.V-30). He concluded that the brain injury and the victim's death were caused by applicant striking and kicking the victim with hands and a foot. (RR.V-35).

16. During cross-examination, applicant admitted that he caused the death of the victim by striking the victim with his hand and kicking the victim with his foot. (RR.VII-88-89).

17. Applicant's attorneys convinced the jury to acquit the applicant of murder. The jury convicted applicant of the lesser-included offense of manslaughter. (CR.1-123). That victory substantially reduced the punishment range that applicant faced from a first-degree felony (5-99 years or life in prison) for murder to a second-degree felony (2-20 years in prison) for manslaughter.

18. The jury assessed punishment at confinement in prison for 20 years and a $10,000 fine. That sentence is consistent with the type of sentences Williamson County juries impose in cases involving acts of violence and death. Based on the trial court's observations during the trial, it was obvious that the videotape of the crime had the strongest impact on the jury's punishment decision.

19. The trial concluded in July 2002. For more than six years after the trial, applicant has been

seeking a new expert opinion, looking for someone that would say the victim died as a result of some cause other than applicant's misconduct. Applicant spent a lot of money and has hired at least two separate new lawyers to pursue that theory (Dick Deguerin and Randy Schaffer). Given the fact that applicant needed such a long time to search for a new expert opinion, and even then only identified a single, retired neurosurgeon to provide a very medically questionable opinion it is extremely unlikely that applicant's trial attorneys could have identified a credible neurosurgeon to testify at trial. Applicant has not identified anyone that would have been available with a credible opinion at the time of his trial.

20. The opinion of retired Dr. Hirshberg, set out in an affidavit, is not credible or reliable.

21. Dr. Hirshberg has no forensic medical experience.

22. Dr. Hirshberg points to no information in the medical records or autopsy report that provides affirmative evidence to support his opinion that the cause of death was the result of an aneurysm. Indeed, the records and report expressly negate the possibility of an aneurysm as the cause of death. The mere presence of speculation in the early medical records about an aneurysm is not evidence supporting a medical opinion on the cause of death. There are no credible facts or data supporting Dr. Hirshberg's medical opinion.

23. In addition, the affidavit of Dr. Hirshberg provides no information on how his opinion is the result of any acceptable medical theory or could

be or has been subject to review by his peers. In short, the affidavit seems to just assume the reader will accept his opinion as fact without any support in the record or his expert medical field. A mere reference to an "evidence-based" approach is not a credible explanation of an acceptable medical theory or principle for establishing a forensic cause of death in a criminal case, especially in the absence of credible affirmative evidence supporting that theory.

24. The affidavit of Dr. Dolinak, the current Travis County medical examiner, is credible and reliable. Dr. Dolinak is a qualified expert in the field of forensic medicine who has clear expertise in the study of head injuries and related causes of death. He identifies specific evidence in the record in support of the cause of death and explains how the injury would have caused the victim's death. He also identifies evidence in the record (based upon accepted, valid medical practices of an angiogram and a visual inspection during an autopsy) that expressly negates any theory that an aneurysm was the cause of the victim's death. Furthermore, he negates the credibility and reliability of the affidavit of Dr. Hirshberg by pointing out the many defects and gaps in that affidavit.

25. There is no credible evidence that the decision of applicant's attorneys to bypass the use of a medical expert at trial was anything but the result of a reasonable and well-considered strategy to focus on the issue far more likely to assist applicant: his mental state at the time of the homicide

26. There is no credible evidence that the applicant's failure to hire a testifying neurosurgeon was the result of inadequate funds or any misunderstanding on the part of defense counsel that the court could appoint such an expert should the applicant have been unable to afford an expert. Indeed, applicant had access to money, hired two highly trained and well-known trial lawyers, reviewed the medical evidence in the case and relied on at least one consulting medical doctor in reaching the conclusion that cause of death was not legitimately in dispute. That shows extraordinary diligence.

27. Before trial, applicant filed a motion in limine regarding evidence that applicant had been in a fight, had a reputation as a fighter or had a reputation as hot tempered or violent. (CR.81-84). After some discussion of related matters that arose during discovery, the motion in limine, subject to the context of that discussion, was granted. (RR.V-6-8).

28. Based on the trial court's observations, during discovery and throughout the trial, applicant's attorneys and the State's attorneys maintained an open discussion of upcoming evidence, repeatedly reaching agreements on the admissibility or exclusion of evidence without the need for a ruling by the judge. Many of those discussions and decisions occurred off the record but were observed by the trial judge.

29. **Direct examination of applicant.** Applicant testified at the guilt/innocence stage of the trial. Applicant's attorney decided to have applicant

open up to the jury, letting them see him as a typical teenager with a few problems but no murderer. Applicant's attorney knew that there were multiple items of information that would likely get to the jury during guilt/innocence or, certainly, during punishment. Applicant's attorneys considered it as part of their strategy to focus on getting the jury to convict for something less than murder and also to mitigate any upcoming punishment evidence by presenting it early through applicant.

30. Applicant's attorney had applicant describe his background, family school and work experience and his participation in football and dirt bike racing. (RR.V11-5-12). Applicant explained that he got a tattoo without the permission of his parents. (RR.V11-10). Applicant also explained that he saved money from his work (matched by money from his father) to buy a truck. (RR.VII-11).

31. Applicant further testified that, on October 6, 2001, he was home from attending the University of Texas in San Antonio as a freshman and went to a party and had a friend buy him a six-pack of beer. (RR.VII-15-16). At that time, applicant was still a teenager and could not legally purchase or consume alcohol. Applicant admitted drinking most of the beer and some hard liquor from a bottle. (RR.VII-21-23, 60-61). Applicant also admitted that marihuana was present at the party. Applicant denied smoking marihuana that night but admitted he had smoked it before. (RR.VII-23). Applicant claimed that he last

smoked marihuana in the middle of his senior year. (RR.VII-23).

32. Applicant admitted that he spoke harshly to the victim at the party, becoming angry when the victim allegedly bumped into some furniture and was wearing some goggles. (RR.VII-19). Applicant explained that he only wanted to take the goggles from the victim so the victim could see. (RR.VII-3).

33. Applicant denied being mad at the victim or *anyone*. (RR.VII-32-33.)

34. Applicant denied *ever* punching *anyone* in a locker room. (RR.VII-35).

35. Applicant denied *ever* calling the victim a "faggot" or being angry at the victim. (RR.VII-36). He denied *ever* using the word "towards people." (RR.VII-36).

36. When applicant's attorney asked, "Did you have thought at that time – truthfully, son, did you have any thought at that time of hurting this boy?", applicant responded, "No sir, I would *never* want to hurt *anybody*." (RR.VII-36) (emphasis added).

37. Applicant admitted that, during his attack on the victim, "I was more out of control where I had no sense of what I was doing and what was going on around me." (RR.VII-39). In explaining why he chased another boy who tried to stop applicant from attacking the victim, applicant admitted, "I have no explanation. Just – I believe I was out of control and totally out of line." (RR.VII-41).

38. When asked whether it was fair for applicant to hit the victim in the face, applicant said, "No sir. That was totally not fair at all.") (RR. VII-42).

39. When asked if he had any reason for hitting the victim while he was on the ground, applicant said, "Absolutely not." (RR.VII-42).

40. When asked why he kicked the victim in the head, even though the victim was on the ground, applicant admitted his reason ("maybe him getting back up and retaliating") was "silly". (RR.VII-4).

41. When asked if he ever knowingly tried to kill the victim, applicant replied, "No sir, I would – I would *never* want to hurt *anybody* like that." (RR.VII-44) (emphasis added).

42. Applicant testified he left the party after attacking the victim and went to his girlfriend's house and "just cried and sat by myself, pretty upset." (RR.VII-50-51).

43. After being notified the police wanted to talk to him, applicant testified he didn't know what to do except "pray" and "cry". (RR.VII-54).

44. During direct examination, applicant's attorney played a recording of a phone conversation between applicant and an officer. (RR.VII-57). On the recording, applicant claims, "I ain't *never* been in a fight, so – and then I hit him." (emphasis added). Earlier in the trial, the State had offered to delete that statement from the recording, but applicant's attorney asked that it stay in the recording. (RR.V-6-7). Applicant's attorney focused on that statement. (RR.VII-58).

Applicant repeatedly explained, "I have *never* been in *any kind of confrontation* with *anybody*." (RR.VII-68, 60) (emphasis added).

45. Applicant then admitted he had previously punched another person on another occasion, explaining he hit the wrong person, after being punched in the jaw. (RR.VII-59).

46. Applicant also admitted writing a letter to the victim's parents, saying, "did not mean at all to hurt your son. I had no grudge against him and did not dislike him *in any way*." (RR.VII-79) (emphasis added).

47. Applicant finished direct examination by denying ever training to fight.(RR.VII-80).

48. Much of the direct examination had the effect of broadly suggesting to the jury that applicant was a peaceful person who would never deliberately hurt anyone or do anything violent.

49. **Cross-examination of applicant.** With the background of direct examination, the State cross-examined applicant and called additional witnesses in rebuttal.

50. Applicant complains that his attorney allowed the State to violate a motion in limine and failed to object before the following evidence was admitted during cross-examination or rebuttal testimony:

    - applicant's temper led him to yell at his girlfriend Kate (RR.VII-105);
    - applicant hit a door when he was 13 years old (RR.VII-106);

- applicant made racial slurs, including those aimed at Asian students (note: the victim in this case was half Taiwanese and had Asian features) ("gooch" and "chink") (RR.VII-225-28);
- applicant bought a truck after indictment (RR.VII-131-33);
- an officer smelled marihuana in applicant's truck after indictment (RR.VII-135-136); and
- applicant went to at least one party where alcohol was served while his case was pending (RR.VII-171-78).

51. The motion in limine was only relevant to the first two items listed above. As to those items, applicant's broad statements during direct examination clearly created the impression that he had never or would never act violently, thereby opening the door for the State to present contrary evidence. If applicant's attorney had raised the motion in limine or made an objection, the judge would have overruled it and admitted the evidence as a reasonable response to the door opened by applicant.

52. As to the evidence regarding racial slurs, it was admissible to explain a possible motive (i.e., applicant disliked Asians and the victim was part Asian). The State clearly had developed evidence that applicant could have formed a dislike of the victim because he was a soccer player (rather

than a football player) and was Asian. If applicant's attorney had objected, the judge would have admitted the evidence to prove motive.

53. Furthermore, applicant's attorneys communicated with the State throughout the trial and often resolved conflicts over the admissibility of evidence by agreement. For all of these items, applicant's attorneys determined that for various reasons the evidence would be admitted at guilt/innocence or certainly at punishment. Applicant's attorneys did not believe there was a credible objection and had already presented similar evidence during direct to minimize any damage. In short, applicant's attorneys strategically decided to abandon the motion in limine.

54. Applicant's attorney first introduced evidence of applicant's ownership of a truck, attempting to suggest to the jury that applicant was a hard-working teenager who shared in the payments for the vehicle he needed for work and school. Such evidence was clearly offered to make the jury sympathetic to applicant. The State's evidence that applicant actually got a truck gifted to him by his mother after being charged with murder put such evidence in context. If applicant's attorney had objected, the judge would have admitted the evidence.

55. Applicant's attorney first introduced evidence suggesting applicant had not used marihuana since high school. Given the obvious presence of marihuana at the party at which the victim died, it is understandable that applicant's attorneys felt like they needed to distance applicant from

use of marihuana. The State's evidence that an officer smelled marihuana in applicant's vehicle during a recent traffic stop was a reasonable method of impeaching applicant's statements. The jury could infer that applicant had indeed used marihuana since high school. If applicant's attorney had objected, the judge would have admitted the evidence.

56. Applicant's attorneys first introduced evidence suggesting applicant was changed by his experience of causing the victim's death. Such evidence was clearly intended to gain sympathy with the jury and encourage them to convict for a lesser crime than murder and be lenient at punishment. The State's evidence that applicant had been to one or more parties serving alcohol after the death of the victim was a reasonable method of impeaching applicant's evidence. If applicant's attorney had objected, the judge would have admitted the evidence.

57. The items listed above by applicant as signs of ineffective assistance, when compared to the numerous separate details about applicant that came out during the guilt/innocence and punishment stages of the trial and when compared to the videotape of the crime, were quite minor and inconsequential in the course of the trial.

## Conclusions of Law

1. When presenting a federal constitutional claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient and (2) but for counsel's alleged unprofessional

errors, there is a reasonable probability that the outcome of the proceeding would have been different. U.S. CONST. amend. VI: *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 764 (1984). A defendant has the burden of presenting a record affirmatively showing ineffective assistance of counsel by a preponderance of the evidence. *Jackson v. State*, 877 S.W.2d 768 (Tex. Crim. App. 1994).

2. Applicant has failed to meet his burden. There is not sufficient credible evidence to establish ineffective assistance of counsel.

3. The performance of applicant's attorneys in representing applicant was not deficient as to use of a medical expert. They conducted a reasonable investigation into the cause of death of the victim and formed the reasonable judgment that pursuit of a defense that challenged the cause of death was risky and unlikely to be successful. Applicant's attorneys reasonably relied on the expert opinion of the treating neurosurgeon, the medical examiner and the advice of an independent consulting medical doctor in forming that judgment. In addition, applicant's attorneys also reasonably relied on their own personal experience and knowledge in support of that judgment.

4. There is no absolute Sixth Amendment constitutional requirement that a lawyer consult with an independent, consulting neurosurgeon before forming a plan in trying a homicide case. This case is substantially distinguishable from the facts in the *Briggs* and *Wiggins* cases cited as authority in applicant's brief. Applicant had

sufficient funds to hire a medical expert (as was done before trial) and developed a specific, reasonable strategy that justified bypassing the additional expense of a neurosurgeon Applicant also has failed to prove that only a neurosurgeon could have identified an alternate cause of death.

5. Furthermore, as a matter of law, there are insufficient facts and data in the record for a medical expert to form a reliable opinion that the cause of the victim's death was anything but the acts of applicant.

6. Even if there were sufficient facts and data in the record to theoretically form such an opinion, applicant's retired neurosurgeon has failed to explain and support how his opinion is the product of a reliable principle or method. By merely stating that his opinion is "evidence-based", he has failed to provide sufficient evidence or explanation that justifies a rational court from accepting his opinion as reliable. He has not provided any evidence to show that studies support his opinion. He has not provided any evidence that his opinion (and the underlying principle or method) has been tested, subject to peer review or publication, have a known or potential rate of error or even have a general acceptance within the scientific community.

7. Applicant has been searching for several years for an expert medical opinion to contradict the evidence presented at trial. At least two excellent lawyers (separate from the lawyers who represented him at trial) have represented him during

that search. Yet, after all those years, applicant can only present a rather theoretical affidavit that speculates on the existence of an aneurysm based only on the absence of evidence. That affidavits is not credible medical evidence.

8. As a matter of law, applicant's alleged expert opinion, as contained in Dr. Hirshberg's affidavit, would not have been admissible at trial. TEX. R. EVID. 702.9.

9. Even assuming that a reliable expert with a properly formed opinion could have been found, applicant has failed to demonstrate prejudice at the guilt or punishment stage under the second prong of *Strickland*. Even if a defense neurosurgeon had testified, no reasonable jury would have believed that applicant was not responsible for the death of the victim. The State would have easily impeached the opinion with the clear medical evidence negating an aneurysm and the powerful affirmative evidence contained in the videotape of the homicide. Indeed, such impeachment likely would have damaged the credibility of the defense in the eyes of the jury and could have resulted in a verdict of guilty as to murder, leaving applicant to face a far higher punishment range. Given the experience with juries in Williamson County, the punishment likely would have been much longer than the 20 years for manslaughter.

10. The performance of applicant's attorneys in representing applicant was not deficient as to the admission of the various extraneous items listed above. Applicant's attorneys had good, strategic

reasons for not objecting and, even if they had objected, the items of evidence would have been admitted as relevant to respond to or impeach applicant's evidence or to prove motive.

11. Furthermore, all of the items listed above that applicant claims should have been subject to an objection at the guilt/innocence phase of the trial would have been admissible at the punishment stage. TEX. CODE CRIM. PRO. art. 37.07, § 3(a)(1).

12. Even if the applicant's attorneys somehow were deficient in failing to object to one or more of the items listed above, the evidence represented by those items had virtually no impact on the trial. Based on the trial court's observation of the trial, a review of the entire record of the trial and the State's repeated use of the graphic recording of the attack by applicant on the victim, the admission of the items listed above did not prejudice applicant at the guilt or punishment stage of the trial.

13. Applicant's trial lawyers conducted themselves professionally before and during trial. They discovered all the relevant evidence, formed a trial strategy and successfully carried it out. Their work resulted in applicant receiving a conviction for a lesser offense than was charged and a substantially lower punishment than likely would have been imposed for a murder conviction.

**Recommendation**

The relief requested should be **Denied**.

The District Clerk shall immediately transmit to the Court of Criminal Appeals these findings and conclusions as provided by law. The District Clerk shall make the clerk's record and reporter's record from the original trial of this case available to the Court of Criminal Appeals upon request. In addition, the Clerk shall attach the following documents:

- VHS duplicate of State's Exhibit No. 7 (videotape clip of homicide committed by applicant);
- post-conviction writ of habeas corpus pleadings, exhibits and brief filed by applicant;
- order designating issues related to habeas writ;
- post-conviction writ of habeas corpus pleadings, answer, letter and affidavits filed by the State.

The Clerk shall send a copy of this order to the Williamson County District Attorney and applicant's attorney (Randy Schaffer).

Signed on this 28th day of May, 2009.

/s/ Burt Carnes
Presiding Judge
368th Judicial District Court